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MATTER OF THE PATERNITY OF M.S.M.,
MICHAEL SCOTT MURPHY,
Appellant-Petitioner,
vs.
SUSAN A. WAY,
Appellee-Respondent.

No. 47A01-0712-JV-603

APPEAL FROM THE LAWRENCE CIRCUIT COURT
The Honorable Andrea K. McCord, Judge Pro Tem
Cause No. 47C01-0410-JP-444

July 22, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Petitioner, Michael Scott Murphy (Father), appeals the trial court's Order denying his Petition to Modify Custody.

We affirm.

ISSUE

Father raises one issue for our review, which we restate as: Whether the trial court abused its discretion when it denied Father's petition to modify custody by relying on findings that were not supported by the evidence, and by reaching a judgment not supported by these findings.

FACTS AND PROCEDURAL HISTORY

On February 25, 2004, Susan Way (Mother) gave birth to M.S.M. Father is the biological father of M.S.M. Mother was not married to Father, but lived with him along with her daughter, K.B., who was about nine-years old and born of her former marriage.

On October 4, 2004, Father filed a petition to establish paternity and determine custody. On November 10, 2004, a hearing was held, and at the conclusion of the hearing, the trial court ordered both Mother and Father to undergo psychological evaluations and meet with a caseworker. On December 13, 2005, Mother and Father came to an agreement that was approved by the trial court by an Agreed Entry on December 14, 2005, which granted physical custody to Mother and joint legal custody to Mother and Father. However, Mother and Father's state of agreement did not last long.

On April 13, 2006, Mother sought a protective order against Father, and that matter was consolidated with the paternity proceedings. On April 20, 2006, Father filed a Motion to Appear and Show Cause alleging that Mother had violated the Agreed Entry by refusing Father parenting time at a scheduled time, was consistently late to parenting time exchanges, refused to allow Father to speak with M.S.M. on the telephone, and refused to keep Father informed of M.S.M.'s medical appointments. On May 4, 2006, Mother filed a motion to dismiss her motion for protective order, and also filed a petition to modify the Agreed Entry on custody and parenting time. On May 10, 2006, Father filed a petition seeking sole custody of M.S.M. At Father's request, the trial court ordered updated psychological evaluations to investigate the inter-relationship between the parents and M.S.M. On August 17, 2007, the trial court held a hearing on the competing motions seeking to change the status of custody and parenting time. On December 4, 2007, the trial court issued its Order, which contained extensive findings of fact, including the following:

9. [Father presented] some evidence at the initial hearing. [Mother] did not present any evidence at this hearing. During [Father's] testimony the [c]ourt heard allegations from [Father] that [Mother] had threatened to do the "Susan Smith [t]hing" and to drive the children to Lake Monroe where she would proceed to drown them in the car. On cross examination it was revealed that [Father] had a Ku Klux Klan [r]obe hanging prominently in his home and that he had a German motorcycle with a [s]wastika [s]ymbol on his German helmet and that he had several guns. Each person had a gun permit.

10. Based upon the seriousness of the allegations of the initial hearing, the [c]ourt ordered the parties to under go psychological testing with Dr. Lois Rifner [Dr. Rifner] and to meet with Jack Maxwell from the Lawrence County OFC.

11. On November 22, 2004, Jack Maxwell filed a written response with the [c]ourt stating that at the request of the court he had done an assessment of

the safety of M.S.M. while in the custody or visiting with his parents. Interviews, history researches, and home visits were done. Additionally[,] Mr. Maxwell spoke with Tony Barger, the ex-husband of [Mother] and [K.B.'s] father. Jack Maxwell reported that there was no child abuse/neglect history found and that the allegations were unsubstantiated by both parents. Both homes appeared to be adequate and safe for the children. Mr. Maxwell found a loaded shotgun in [Father's] bedroom. Both parents have gun permits and carry handguns. Mr. Maxwell found that the current health and safety of both [M.S.M.] and [K.B.] was satisfactory and that it would be in the best interest of the children to have continued regular contact with both parents without interruption or interference by the other. []

12. Dr. [] Rifner interviewed the parties and conducted MMPI-2 tests. Dr. Rifner filed a report with the court of her "assessment" to assist the [c]ourt in making a decision about custody and visitation. The parties shared in the expense for Dr. Rifner. It is important to note that at no time did Dr. Rifner conduct a custody evaluation or make a custody recommendation to the [c]ourt.

13. In the November of 2004 report, Dr. Rifner found the following concerning [Father]:

* * *

d. [Father] reported to Dr. Rifner that he met [Mother] while going through a divorce from his first wife of 16 years. [Father] reported that the divorce was the result of financial problems and that he and his wife disagreed throughout their marriage on whether or not to have children with [Father] stating clearly that he had never wanted children. He was drinking more at that time. He stated [Mother] was "pursuing" him and that he was foolish in becoming involved with her. [Father] stated he thought [Mother] was on birth control.

e. [Father's] home was bought by General Motors because of the PCB clean up and "all hell broke loose" when he would not agree to move with [Mother] to her home in Mitchell.

f. [Father] reported a suicide attempt in 1987 and that he had been arrested for DWI for which he admitted himself into detox in Bloomington. [Father] was arrested a second time in about 2004 when he failed a field sobriety test. [Father] stated he generally drinks with a friend and will have [three] pints of ale over a six to eight hour period. He stated he

would drink three out of four weekends. [Father] admits that he has at times had as many as eight to ten pints. There was nothing in the MMPI-2 that suggested a problem with addiction.

g. The Child Abuse Potential Inventory for [Father] found that it is unlikely that [Father] would be an abusive parent however that having a child one did not want is also related to increased risk of abuse.

h. The MMPI-2 test for [Father] found that he is comfortable socially but that he is likely to be emotionally dependent on others. He appeared to have a high need for approval and tends to be conforming and conventional. There was evidence that he has a chronic and intense anger, with hostile and aggressive impulses. He tends to blame others for his problems. He is cynical and suspicious and often responds to family and to criticism with hostility. Suicidal acting out is likely especially when intoxicated. [Father] had a high level of repression and denial and is likely to describe himself as an angry individual. Much of his anger may be in the form of indirect sabotage, but he can also be openly defiant and uncooperative. He may be somewhat self-indulgent and resentful of demands made on hi[m] by other[s].

[i]. [Father] insisted he ordered the KKK robe from the web site as a “joke.” However the MMP[I]-2 results suggest that [Father] is the type of person who might be involved in a fanatical group—cynical, suspicious, defiant of authority, angry and blaming others.

j. Dr. Rifner reported that [Father] has three guns, a concealed weapon that he carried on his person, a loaded shotgun that he kept by his bed, and a 22 gauge rifle in his “junk” room.

14. In the November 2004 report Dr. Rifner found the following concerning [Mother]:

a. [Mother] was 35 years of age, divorced and currently living in Mitchell with her two children, [K.B] and [M.S.M.] [Mother] completed one and one-half years of college.

b. [Mother] is currently receiving disability benefits suffering from Ehlers-Danlos Syndrome. She has been trained as an EMT and has worked in home health care and for an ambulance service.

* * *

e. [Mother] reported that [Father] was inappropriate in that he bit [K.B.], that he twisted her wrist, and that he exposed himself and urinated in front of [K.B.] He took close up shots of [M.S.M.]’s penis.

* * *

h. [Mother] rarely uses alcohol. There was nothing in her MMPI-2 that was suggestive of an addiction problem. (The [c]ourt notes there is no history of [Mother] being arrested.)

i. [Mother] did not report any current symptoms of depression.

* * *

n. [Mother] flatly denied that she had ever threatened the life of either of her children or that she had ever said she would imitate Susan Smith. (The [c]ourt notes that other than [Father’s] allegation, there was no evidence of this statement or threat being made by [Mother] at any time.)

15. In her conclusion Dr. Rifner found that [Father] had never wanted a child and feels that he was “tricked” by [Mother]. He feels a duty to see that his son has a “good” life. Both parents have significant problems with anger. [Father] had problems with authority and can be defiant and uncooperative. [Mother] is more likely to be unpredictable in her anger and aggression which puts her at risk to be abusive or to hurt the children. There is no evidence of abuse. Neither parent has an addiction problem or significant mental health issues. [Mother] has a chronic health problem that does not appear to interfere with her ability to parent.

16. Upon [Father’s] request for a custody evaluation, the [c]ourt appointed Maria Burks, a licensed mental health counselor, to do a custody evaluation. The parties shared in this expense.

17. On April 18, 2005[,] [] Burks filed her custody evaluation with the [c]ourt which contained the following relevant parts:

a. [Mother] described [Father] as “a liar, lazy, having poor hygiene, full of anger, controlling, drinking too much at times, involved in the KKK, having multiple loaded guns in his home, in trouble with the IRS, is a poor businessman who does not pay his bill and pays his employees in cash at his shop, dependent on [his] mom to clean his home, do his laundry and clean his shop, abusive mentally and physically to her, abusive to her

daughter and abusive to his son[] (taking pictures of his genitals, playing too rough with him).

b. [Father] described [Mother] as “a liar, dangerous, abusive mentally and emotionally to her children, controlling and manipulative, depressed and angry, vindictive, and having poor boundaries and poor judgment. She tries to be a friend instead of a parent to [K.B.]”

c. [] Burks found that neither parent possessed appropriate parenting skills and strongly recommended that they take parenting classes. [Mother] took a 12 week single parent class at her church. [Father] attended a Dad’s parenting class through Hoosier Uplands.

[d]. [] Burks observed [M.S.M.] with both parents and found he appeared calm and relaxed.

e. Dr. Sorrells, the pediatrician, reported that he had no concerns regarding [M.S.M] and that he appeared to be well cared for.

f. [K.B.] reported to [] Burks that she had witnessed [Father] and [Mother] yelling and screaming, that [Father] spit in [Mother’s] face, knocked a plate from her hand and then he broke a door.[]

g. [] Burks found that [M.S.M.] is not in physical danger with either of his parents but that he would most assuredly be in danger of emotional and mental abuse/neglect if the court does not intervene on his behalf.

h. [Father] reported to [Burks] that “he does not necessarily feel his son is in any danger physically while in the care of his mother.” (The [c]ourt notes that this is direct contrast with his statement to the court that he felt the children were in danger since [Mother] had threatened to do the Susan Smith [t]hing.)

i. [] Burks recommended the following:

1. That both parents seek professional counseling.
2. That both parents be evaluated by a psychiatrist for medication issues.
3. That [M.S.M.] and [K.B.] enter counseling with a licensed child therapist.

4. That they share joint legal custody of their son and participate in his educational, medical and counseling services.

5. That if [Mother] complies with the above recommendations, that [M.S.M.] should continue to reside with [Mother] with State Guideline Visitation for [Father].

6. That if [Mother] did not comply that [M.S.M.] should reside with [Father] with State Guidelines for [Mother].

j. The [c]ourt notes that the level of distrust is evident in that when asked by [] Burks, each first described the other as a “liar.”

* * *

26. [] Burks observed one of the exchanges when Father picked up [M.S.M.] [M.S.M.] displayed no separation anxiety in leaving Mother and going to Father.

27. As the result of her evaluation of Father, Dr. Rifner saw no reason that Father’s parenting time should be reduced or that would preclude Father from having custody of M.S.M. Dr. Rifner had no concerns about Father. Father’s most recent MMPI-2 showed no problems with anger[.]

* * *

29. Dr. Rifner filed her Updated Evaluation Relative to Parenting with the [c]ourt[] on February 13, 2007. Dr. Rifner made the following findings which the [c]ourt accepts:

a. Mother and Father’s responses to the MMPI-2 and SASSI-3 indicate a low probability of substance dependence for either.

b. With respect to mental health issues related to parenting, Mother’s most recent MMPI-2 could not be interpreted because of her attempt to put herself in an unrealistic positive light.

c. With respect to mental health issues related to parenting, nothing on Father’s MMPI-2 suggested psychiatric problems.

d. Both parents completed a parenting program as recommended by [] Burks.

e. Mother was observed often repeating verbatim what [M.S.M.] said, which could be contributing to his tendency to repeat himself. No separation anxiety was observed.

f. Father was responsive to [M.S.M.'s] conversation without being repetitive.

* * *

k. Mother and Father are unable to jointly make decisions and resolve problems.

l. Mother was less than cooperative with Dr. Rifner's evaluation.

m. Father has evidenced some willingness to accept responsibility for his errors in judgment and try to move on. Mother appears to be stuck with her past grievances.

n. It is unlikely that Mother and Father will manage the collaboration required by joint custody any time in the near future.

* * *

34. The parents attended four sessions with Dr. Laurence Barnhill as a parenting coordinator. They were only marginally successful. It does not appear working with a parenting coordinator will be beneficial in this matter.

35. Father has some difficulty with authority and gets frustrated with others not being fair, in his perception.

36. Dr. Rifner and [] Burks both appeared to present testimony in the modification hearings. Dr. Rifner did not do a custody evaluation but does believe [Father] may be the more appropriate parent for M.S.M. [] Burks did not do a custody update but feels that since [Mother] has complied with all of her recommendations, that M.S.M. is doing well in [Mother's] care, and the he is bonded and attached to [Mother], that his primary care should remain with [Mother].

37. Both [Mother] and [Father] have had some mental issues in the past. Both have attempted suicide and had depression several years ago. Neither appears

to be having any depression or suicidal tendencies at this time. [Mother] does take a low dosage of medications for her pain and to assist her in sleeping.

38. [Father's] position that the KKK robe in his home is a "joke" and is not symbolic of anything wrong and that his attitude towards people of color is not relevant to any of the issues is incorrect. [Father] agreed with his witness that a KKK robe is just a "piece of white cloth." This way of thinking is a concern to the court.

39. It is in [M.S.M.'s] best interest to not be exposed to racial prejudices and militant symbolic images during his tender years and during his early developmental stages. It is important that his parents instill in [M.S.M.] the need for tolerance and understanding for people of all races and colors and religious practices. This is vital if [M.S.M.] is to grow into a happy and well-adjusted child and then into a productive adult in our community.

40. In addition to the KKK robe, [Father] owns and rides a German motorcycle and he [has] a swastika on his helmet.

* * *

47. The ongoing theme in all of the hours of testimony is the intense distrust between [Father] and [Mother] and the difficulty they have in getting along and communicating about decisions concerning [M.S.M.] The [c]ourt allowed each parent to have as much time as he or she deemed necessary to state his or her case relative to the modification of custody and the [c]ourt reviewed all of its note[s] and exhibits prior to making this decision. The [c]ourt is pleased that now they are communicating with each other by email and that [Mother] is sending [Father] information concerning [M.S.M.]

48. Even though this matter has been highly contentious and the [c]ourt did hear hours of testimony, the basic facts are that [M.S.M.] has been in the continuous care and custody of [Mother] since his birth, that he is 3 years of age, that he is thriving and is well cared for, and that he has bonded with [Mother]. [M.S.M.] has a sister, [K.B.], that also resides with [Mother]. [K.B.] and [M.S.M.] have a great relationship. [Father] acknowledges that [Mother] is a "good" mother. The parties previously agreed that [M.S.M.] should be in [Mother's] primary physical care.

49. It is obvious to the court that each parent loves [M.S.M.] and could do a good job of caring for him and nurturing him in his or her own way.

However[,] this is a *modification* of custody not an original custody determination

50. In this instant case, [M.S.M.] is only three years of age and the parties have been in almost continuous litigation since October of 2004. The breakdown in their communication has reached the point where it is adversely affecting [M.S.M.] and will in all likelihood continue to be contentious and will continue to adversely affect M.S.M. This conflict does not allow for a good interaction and interrelationship between the child and his parents. This conflict presents a high-risk situation for [M.S.M.] unless the high level of conflict between [Father] and [Mother] is resolved.

51. It is highly unlikely that [Mother] and [Father] will be able to share the authority and responsibility for the major decisions concerning [M.S.M.'s] upbringing, including his education, healthcare and religious training. The level of conflict and distrust when attempting to discuss these issues would only cause additional stress and conflict, and spill over onto [M.S.M.] It is no longer in the best interest of [M.S.M.] for the parties to share joint legal custody.

52. [M.S.M.] has been in [Mother's] continuous care since his birth. He has adjusted well to being with [Mother]. He is bonded with [Mother] and to his sister, K.B. He is not yet in school but [Mother] has him involved in neighborhood activities in the church.

53. [M.S.M.] should have quality time with each parent but he should not be subjected to the continuous conflict and the high level of conflict that will in all likelihood continue if his parents are to be required to legally share in making the major decisions concerning his life. They do not agree on his education and here has been conflict with obtaining healthcare for [M.S.M.]

(Appellant's App. pp. 10-22).

Based on these findings, the trial court concluded that it was in the best interest of M.S.M. to award sole legal custody to Mother, who would also retain sole physical custody. The trial court outlined a schedule for parenting time for Father, which closely followed Indiana's parenting time guidelines.

Father now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Father argues that the trial court abused its discretion by failing to modify custody of M.S.M. as he requested.¹ Specifically, he contends that the trial court failed to consider the best interests of M.S.M. when refusing to modify the previously agreed custody arrangement as he requested.

We review decisions on custody modification requests for an abuse of discretion, with a preference for granting latitude and deference to our trial courts in family law matters. *Van Wieren v. Van Wieren*, 858 N.E.2d 216, 221 (Ind. Ct. App. 2006). When reviewing a trial court's ruling on a petition to modify custody, we may neither reweigh the evidence nor judge the credibility of the witnesses. *Id.* We consider only the evidence most favorable to the judgment and any reasonable inferences that may be drawn from that evidence. *Id.*

In making an initial custody determination, a trial court shall consider:

- (1) The age and sex of the child.
- (2) The wishes of the child's parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - i. the child's parents;
 - ii. the child's siblings; and
 - iii. any other person who may significantly affect the child's best interest.
- (5) The child's adjustment to home, school, and community.
- (6) The mental and physical health of all individuals involved.

¹ Father states by footnote that he "is not appealing the modification of joint legal custody to sole legal custody. He is appealing which parent should have sole legal custody." (Appellant's Br. p. 21). So we interpret his arguments as focusing on the trial court's denial of his petition to modify custody, but not the grant of Mother's petition to modify custody.

- (7) Evidence of a pattern of domestic or family violence by either parent.

Ind. Code § 31-14-13-2. Once a custody order is made, the trial court may not modify that order unless: (1) modification is in the best interests of the child; and (2) there is a substantial change in one or more of the factors listed above. I.C. § 31-14-13-6. “In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody should be altered.” *Kondamuri v. Kondamuri*, 852 N.E.2d 939, 945 (Ind. Ct. App. 2006). Moreover, the party seeking the modification bears the burden of demonstrating that the existing custody order is unreasonable because, as a general proposition, stability and permanence are considered best for the child. *Barger v. Pate*, 831 N.E.2d 758, 762 (Ind. Ct. App. 2005).

Father separates his arguments into three separate sections: (1) the trial court’s findings do not support its decision not to modify custody as he requested; (2) the trial court’s findings that are critical to its refusal to modify custody as he requested are not supported by the evidence; and (3) other findings of the trial court critical to its decision rely upon evidence taken out of context. However, Father does not challenge several of the trial court’s findings. Specifically, Father does not challenge the finding that it is highly unlikely that Mother and Father will be able to share authority and responsibility for the major decisions concerning M.S.M.’s upbringing. Nor has Father disputed the trial court’s findings that:

Even though this matter has been highly contentious and the [c]ourt did hear hours of testimony, the basic facts are that [M.S.M.] has been in the continuous care and custody of [Mother] since his birth, that he is 3 years of age, that he is thriving and is well cared for, and that he has bonded with [Mother]. [M.S.M.] has a sister, [K.B.], that also resides with [Mother]. [K.B.] and [M.S.M.] have a great relationship. [Father] acknowledges that [Mother] is a “good” mother. The parties previously agreed that [M.S.M.] should be in [Mother’s] primary physical care.

(Appellant’s App. p. 21). And finally, Father has not challenged the findings that he has previously acted inappropriately before K.B., Dr. Rifner’s determination that he has significant problems with anger and authority, or that his display of, and attitude towards, symbols of racial prejudice was concerning to the trial court. Because Father has not challenged the propriety of several findings upon which the trial court could have relied to reject his request to modify custody, we interpret his contentions as requests to consider evidence contrary to the judgment and reweigh the evidence and findings, which we cannot do. *See Van Wieren*, 858 N.E.2d at 221. Moreover, we conclude that even if we were to ignore the findings challenged by Father, ample findings would remain to sufficiently support the trial court’s denial of his petition to modify custody, and therefore, Father has not met his

burden of demonstrating that the existing custody order, as modified, is unreasonable. *See Barger*, 831 N.E.2d at 762.

CONCLUSION

Based on the foregoing, we conclude that the trial court did not abuse its discretion when it denied Father's petition to modify physical custody.

Affirmed.

BAKER, C.J., and ROBB, J., concur.